

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 59 of 1990

with

FIRST APPEAL No 60 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

H K DHURVA

Appearance:

1. First Appeal No. 59 of 1990
MR JC SHETH for Petitioner
PARTY-IN-PERSON for Respondent No. 1, 2, 3
 2. First Appeal No 60 of 1990
MR JC SHETH for Petitioner
PARTY-IN-PERSON for Respondent No. 1, 2, 3
-

CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE K.M.MEHTA

Date of decision: 19/10/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE K.M.MEHTA)

Union of India, the appellant-original applicant has filed this appeal under Section 39 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act') against the judgement and decree dated 18.7.1989 passed by the learned Judge, Court No. 6, City Civil Court, Ahmedabad, in Civil Miscellaneous Application No. 494 of 1985 (for setting aside the award) as well as Civil Miscellaneous Application No. 359 of 1985 (for making Award a rule of the court) wherein the learned judge was pleased to partly modify the award of the arbitrator as regards interest and pleased to dismiss the application of Union of India for setting aside the award under Section 30 read with Section 33 of the Arbitration Act, 1940.

2. The facts giving rise to these appeals are as under:

2.1 Union of India through Executive Engineer (Construction), Western Railway, Rajkot, invited tender No. XEN(C)/RJT/245 in 1979 for providing Island platform and extension of existing platform in Rajkot yard in connection with Viramgam-Okha-Porbandar Conversion Project. Shri H.K. Dhruva, respondent herein and original claimant filled up the tender and his tender was accepted. Thereafter, Contract Agreement No. RJT/W/CA/150 dated 15.6.1979 was executed between the parties - Union of India and Mr. Dhruva. It was for a sum of Rs. 3,94,117.20 (Rupees three lakh ninety four thousand one hundred seventeen and twenty paise only).

2.2 As per the contract, the work to be completed on or before 31.10.1979. Regarding the work, correspondence was exchanged between the parties and ultimately, the contract was rescinded on 25.5.1981. The contractor replied to it vide letter dated 2.6.1981 and agreed to complete the work within the extended time from time to time upto December 31, 1981. However, vide letter dated 4.1.1982, the contract was rescinded from 31.12.1981. The contractor, thereafter, issued a notice on 12.5.1982 and 24.12.1982 under clauses 62 and 63 of the contract. Clauses 62 and 63 of the Contract read as under:

"Cl. 62 - All disputes or differences of any

kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters decision of which is specially provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, which matters are referred to hereinafter as Excepted Matters shall be final and binding upon the Contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without Appeal.

Cl. 63(1) - If the Contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference, on any account or as to the withholding by the Railway of any certificates to which the Contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case but except in any of the Excepted Matters referred to in Clause 62 of these conditions the Contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration."

2.3 The respondent contractor thereafter filed a Civil Miscellaneous Application No. 125 of 1983 on 14.2.1983 under Section 8 and 9 of the Act for appointment of an Arbitrator. The Railway contested the said application.

2.4 The City Civil Court, 18th Court, by judgement and order dated 28.12.1983 in Civil Miscellaneous

Application No. 125 of 1983 was pleased to observe as under:-

"The opponent General Manager, Western Railway, Churchgate, Bombay was directed to appoint Arbitrator to resolve the disputes and differences between the parties as per clause 62 and 63 of General Conditions of Contract within six months."

2.5 In view of the aforesaid order, the General Manager by his communication dated 28.5.1984 was pleased to appoint Shri G.S. Koppikar and Shri S.E.H. Shah as Arbitrators in this behalf. The General Manager was pleased to nominate both of them as joint Arbitrators to arbitrate upon the disputes and differences that have arisen between the Railway Administration and the contractor mentioned in the terms of reference. The General Manager also set out various claims which have to be decided between the parties including the counter claim. The General Manager also directed the Arbitrator to comment upon the reference and pleased to give break up of the sum, if any, awarded for each items on the dispute in terms of the General Conditions of Contract dated 27.5.1975.

2.6 In terms of the same, Arbitrators were appointed. The Arbitrators were pleased to award a sum of Rs. 3,21,441/out of the claim of Rs. 8,24,388/- in favour of the claimants. The Arbitrator also rejected the counter claim of the Railway which was made upto Rs. 25,000/-.

2.7 The Western Railway then filed Civil Miscellaneous Application No. 281 of 1985 in the City Civil Court, Ahmedabad, under Section 14(2) of the Act to direct the Arbitrator to file the award in court. The Arbitrators have filed the award in court by their letter dated 20.8.1985 received by the court on 24.8.1985 to make it Rule of the Court which has been registered as Civil Miscellaneous Application No. 359 of 1985 in the Court. The Arbitrator also passed the order that if payment of award is not made within 30 days from the date of award then simple interest at the rate of 10% per annum would be payable by the respondent Western Railway to the claimant for the period of delay. The Arbitrators have produced along with the said letter all depositions and documents which have been taken on record and placed before them.

2.8 Notice of Civil Miscellaneous Application No.

359 of 1985 was served to both the contractor and the Western Railway. The Western Railway thereafter filed CMA No. 494 of 1985 in City Civil Court, Ahmedabad, under Sections 30 and 33 of the Act for setting aside the award of the Arbitrators.

2.9 As regards CMA No. 359 of 1985 the respondent contractor has filed purshis on 15.10.1985 and has stated that respondent admitted the award published and filed by the Arbitrators and that decree be passed in terms of the Award with future interest from the date of the decree till realisation under Section 29 of the Arbitration Act. The appellant herein has filed its reply on 28.1.1986 and has stated that it has challenged the award as it has filed CMA No. 494 of 1985 for setting aside the award. In that application, the Western Railway assailed the award mainly on four grounds, viz., (1) that the award is vitiated by error apparent on the face of the record (2) the arbitrators are guilty of legal misconduct (3) the award is perverse and (4) it is not a speaking award.

2.10 In CMA No. 494 of 1985 the Contractor opponent has filed his reply on 17.3.1986 and contested the said application. Both CMA No. 494 of 1985 as well as CMA No. 359 of 1985 were heard together by the learned City Civil Judge and at the time of hearing of those applications on behalf of the Railway the learned counsel has raised all contentions which have been set out in CMA No. 494 of 1985 before the Court. Learned advocate for the Railway stated that the arbitrators were called upon to decide three questions raised, namely, (1) whether the termination of the contract done by the Railway Administration is correct (2) whether the contractor is entitled to claim Nos. 1 to 10 as stated therein and (3) whether the Western Railway's counter claim for Rs. 25,000/- towards risk costs and recoveries after adjustment of available security deposit, if available at all or in part or in full. It was submitted that the learned arbitrators have not given specific answers to these three questions separately. They have only stated that the amount awarded to the contractor with break up. Learned counsel for the Railway submitted that the arbitrators should have separately given answer to each question.

2.11 The City Civil Court, Ahmedabad, pleased to reject the said contentions of the Railway and has held that the arbitrators have given finding on all three questions as understood apparently on the face of the record and it cannot be said to be an error apparent on

the face of the record as contended by the learned counsel for the Western Railway. The learned judge also held that the award of the arbitrators is not perverse and rejected the contention of the Railway in this behalf.

2.12 The learned counsel for the Railway has stated that the award is not a speaking award. That contention was also rejected by the learned judge relying on the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of RAIPUR DEVELOPMENT AUTHORITY VS. M/S. CHOKHAMAL CONTRACTORS reported in Judgement Today 1989(2) SC 285 = AIR 1990 SC 1426.

2.13 As regards interest is concerned, the learned judge confirmed the award of interest of the arbitrators.

3. Before we consider the rival contentions, few relevant statutory provisions may also be noted. Arbitration Act, 1940, is an Act for Arbitration. Section 2(a) provides for definition of 'Arbitration Agreement' which means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not and section 2(b) provides for 'Award' means an arbitration Award. Section 8 of the Act provides for power of the Court to appoint arbitrator or umpire. Section 14 of the Act provides for award to be signed and filed. Section 17 of the Act provides for judgement in terms of award. Section 29 provides for paying interest. Section 30 of the Act provides for grounds for setting aside award. Section 33 of the Act provides for Arbitration agreement or award to be contested by application and Section 39 of the Act provides for filing of appeals.

4. At the time of hearing of this appeal learned counsel Shri J.C. Sheth as well as Mr. J.J. Yagnik for the Railway contended the following points for our consideration.

- (i) The learned counsel stated that the award of the arbitrators is a non-speaking award and therefore the same is liable to be set aside.
- (ii) The learned counsel further stated that in this case the City Civil Court has passed order directing the General Manager, Western Railway, to appoint arbitrators and the General Manager, Western Railway, appointed arbitrators and set out terms and conditions of reference to the arbitrators. The arbitrators have acted beyond

the terms of reference and therefore the award is liable to be set aside.

(iii) The arbitrators have also given interest amount which is also contrary to the terms and conditions of the Western Railway and therefore also the award of the arbitrators is liable to be set aside.

5. On the other hand, Mr. Dhruva - party-in-person has tried to reply to the aforesaid contentions. He has stated that the Arbitrators need not give any reasons. In support of the same, party-in-person has relied on the judgement of the Hon'ble Supreme Court in the case of RAIPUR DEVELOPMENT AUTHORITY VS. M/S. CHOKHAMAL CONTRACTORS reported in AIR 1990 SC 1426 in para 38 the Hon'ble Supreme Court has observed as follows:-

"Having given our careful and anxious consideration to the contentions urged by the parties we feels that law should be allowed to remain as it is until the competent legislature amends the law. In the result we hold that an award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been given in its support except where the arbitration agreement or the deed of submission or an order made by the Court such as the one under Section 20 or Section 21 or Section 34 of the Act or the statute governing the arbitration requires that the arbitrator or the umpire should give reasons for the award. These cases will now go back to the Division Bench for disposal in accordance with law and the view expressed by us in this decision."

6. Mr. Dhruva - party in person further contended that here the arbitrators have given break up of each claim as directed by the letter of the General Manager, Western Railway and they have also considered the counter claim of the Railway and therefore, the arbitrators have acted within the terms of the reference and there is no illegality committed by the arbitrators. Mr. Dhruva has also stated that this court has very limited jurisdiction to consider the legality and validity of the award of the arbitrators as confirmed by the trial court. For that purpose learned counsel has relied on the recent judgement of the Hon'ble Supreme Court in the case of RAJASTHAN STATE MINES & MINERALS LTD. VS. EASTERN ENGG. ENTERPRISES reported in 1999(9) SCC 283 particularly para

44 (at page No. 309) (clauses (a), (b) (c) and (of)).

Para 44 - From the resume of the aforesaid decisions, it can be stated that:

- (a) It is not pen to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.
- (b) It is not open to the curt to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.
- (c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.
- (d) xxxxxx
- (e) xxxxxxxx
- (f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the record."

7. Mr. Dhruva - party in person has also stated that in this case the arbitrators have directed the amount of award to be given to the contractor by the Railway and it is also directed that if there is delay in payment of the amount of the award then the Railway has to pay interest on the same. He has therefore relied on the judgement of the Constitution Bench of 5 Judges of the Hon'ble Supreme Court in the case of SECRETARY, IRRIGATION DEPARTMENT, GOVT. OF ORISSA & OTHERS VS. G.C. ROY reported in AIR 1992 SC 732 and also on another judgement in the case of HINDUSTAN CONSTRUCTION CO. LTD. VS. STATE OF J & K reported in AIR 1992 SC 2192 where the Hon'ble Supreme Court has clarified the position and also held that the period of interest is computed from the date of the award to the date of payment in which at para 5 it is stated as under:-

"Para 5 - The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the

latest decision of a five Judge Bench of this court in Secretary, Irrigation Department of Orissa Vs. G.C. Roy (1991) 6 JT 349 (AIR 1992 SC 732). Though the said decision deals with the power of the Arbitrator to award interest pendente lite, the principle of the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to a arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post award period is a matter of procedure. Section 34 of the Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post decree period and the principle of S. 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. In this connection, the decision in Union of India Vs. Bango Steel Furniture (P) Ltd. (1967) 1 SCR 324/329: (AIR 1967 SC 1032 at page 1035) may be seen as also the decision in Gujarat Water Supply & Sewage Board Vs. Unique Erectors (1989) 1 SCR 318: (AIR 1989 SC 973) which upholds the said power though on a somewhat different reasoning. We, therefore, think that the award on item No. 8 should have been upheld."

8. Mr. Dhruva has also relied on the judgement in the case of STATE OF ORISSA VS. B.N. AGARWALLA reported in AIR 1997 SC 925. In paragraph 18 the Hon'ble Supreme Court has observed as under:-

"In view of the aforesaid decisions there can be no doubt with regard to the jurisdiction of the arbitrator to grant interest. The principles which can now be said to be well settled are that the arbitrator has the jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978, has become applicable. With regard to those cases pertaining to period prior to the applicability of the Interest Act, 1978. In the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest. For the period during which the arbitration proceedings were pending in view of the decision in G.C. Roy's case (1992) AIR SCW 389) (supra) and Hindustan

Constructions Limited case (1992) AIR SCW 2647 (supra), the arbitrator has the power to award interest. The power of the arbitrator to award interest for the post award period also exists and this aspect has been considered in the discussion relating to Civil Appeal No. 9324 of 1994 in the later part of this judgement."

9. In our opinion the first contention of the learned counsel for the appellant is rejected on the ground that there is a judgement of the Hon'ble Supreme Court in Raipur (supra). The learned counsel could not point out any terms of reference which provides that the arbitrators should give reasons. In absence of such terms of reference, the arbitrators are perfectly justified in giving a non-speaking award. However, it may be stated that the arbitrators have dealt with each and every claim which has been made by the claimant and awarded as per the letter of appointment of arbitrators. In view of the same, the award of the arbitrators cannot be set aside on the said ground. The award of the arbitrators cannot be set aside on the ground that they have acted beyond the terms of reference.

10. In our opinion, the arbitrators have given interest on the amount awarded as stated that if the Railway fails to pay the amount within 30 days from the date of the award, the Railway is liable to pay 10% interest on the said amount from the date of the award and the City Civil Court has partly confirmed the same by reducing the rate of interest from 10% to 9% on principal amount of Rs. 2,95,941/- in view of the judgement of the Hon'ble Supreme Court which we have referred earlier. Both the arbitrators as well as City Civil Court are perfectly justified in awarding interest on the amount of award from the date of the award till the amount is paid. In view of the same, we do not find any infirmity in the award of the arbitrators. We also do not find any error apparent on the face of the record as well as the order of the trial court which has confirmed the award of the arbitrators and partly modified in this behalf.

11. In view of the same, we do not find any substance in the arguments of the learned counsel for the appellant. We accept the contentions raised by Shri Dhruva-party in person which are fully supported by the decisions of the Hon'ble Apex Court. We therefore dismiss the appeal with no order as to costs.

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